UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, CARLENE BECHEN, ELVIRA BUMPUS, RONALD BIENDSEI, LESLIE W. DAVIS, III, BRETT ECKSTEIN, GEORGIA ROGERS, RICHARD KRESBACH, ROCHELLE MOORE, AMY RISSEEUW, JUDY ROBSON, JEANNE SANCHEZ-BELL, CECELIA SCHLIEPP, TRAVIS THYSSEN and CINDY BARBERA,

Plaintiffs,

TAMMY BALDWIN, GWENDOLYNNE MOORE, and RONALD KIND,

Intervenor-Plaintiffs,

v.

Members of the Wisconsin Government Accountability Board, each only in his official capacity: MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, TIMOTHY VOCKE, and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board,

Defendants,

F. JAMES SENSENBRENNER, JR., THOMAS E. PETRI, PAUL D. RYAN, JR., REID J. RIBBLE, and SEAN P. DUFFY,

Intervenor-Defendants

Case No. 11-C-562
JPS-DPW-RMD

VOCES DE LA FRONTERA, INC., RAMIRO VARA, OLGA VARA, JOSE PEREZ, and ERICA RAMIREZ,

Plaintiffs,

v.

Members of the Wisconsin Government Accountability Board, each only in his official capacity: MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, TIMOTHY VOCKE, and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board,

Defendants.

Case No. 11-CV-1011
JPS-DPW-RMD

DEFENDANTS' RESPONSES TO PROPOSED CONCLUSIONS OF LAW

The defendants Members of the Wisconsin Government Accountability Board, each only in his official capacity ("GAB"), by their attorneys, the Wisconsin Department of Justice and Reinhart Boerner Van Deuren s.c., respond to the Proposed Conclusions of Law of Plaintiffs Alvin Baldus et al. and Voces de la Frontera, Inc., in accord with the Court's pretrial order as follows:

PROPOSED CONCLUSIONS OF LAW

I. BALDUS PLAINTIFFS

519. The Equal Protection Clause requires "substantially equal state legislative representation for all citizens." *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). Regardless of size, population deviations that cannot be justified by traditional redistricting criteria violate the Equal Protection Clause.

Response: **No dispute as to the first sentence. As to the second, the proposed conclusion misstates the law. "[S]tate reapportionment statutes are not subject to the same strict standards applicable to reapportionment of congressional seats." *White v. Regester*, 412 U.S. 755, 763 (1973). Unlike reapportionment of federal congressional districts, where nearly any deviation from perfect population equality must be justified, population deviation between state legislative districts must be shown to rise to a certain threshold before it is appropriate for a federal court to**

demand justification. *Id.*; *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973). "[M]inor deviations from mathematical equality among state legislative districts are insufficient to make out a *prima facie* case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State". *Gaffney*, 412 U.S. at 745. The reason for the difference is that the standard for congressional seats derives from Article I, Section 2 of the U.S. Constitution while the state standard derives from the Equal Protection clause. *Reynolds v. Sims*, 377 U.S. 533, 560 (1964).

The U.S. Supreme Court has, since deciding *Gaffney*, clarified that population deviations under 10% will almost never be sufficient to make judicial intervention appropriate. *See, e.g.*, *Gaffney*, 412 U.S. at 750 (holding that lower court should not have gotten involved where state plan created House districts with a maximum population variance of 7.83% and Senate Districts with a maximum population variance of 1.81%); *White*, 412 U.S. at 764 ("we cannot glean an equal protection violation from the single fact that two legislative districts in Texas differ from one another by as much as 9.9%"); *Brown v. Thompson*, 462 U.S. 835, 842 (1983) ("[o]ur decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations"); *see also Frank v. Forest County*, 194 F.Supp.2d 867, 874 (E.D. Wis. 2002) (burden to justify variance does not shift to defendant until plaintiff makes showing of a greater than 10% population deviation).

520. The Wisconsin Constitution requires that legislative districts "be bounded by county, precinct, town or ward lines . . . and be in as compact form as practicable." Wis. Const. art. IV, § 4.

***Response:* The Wisconsin Constitution requires that *assembly* districts "be bounded by county, precinct, town or ward lines . . . and be in as compact form as practicable." Wis. Const. art. IV, § 4.**

519. Deviations from population equality in legislative districts can only be based on "legitimate considerations incident to the effectuation of a rational state policy," *Reynolds v. Sims*, 377 U.S. 533, 579 (1964), including established redistricting criteria, *Baumgart v. Wendelberger*, No. 01-C-0121, 02-C-0366, 2002 WL 34127471 (E.D. Wis. May 30, 2002).

***Response:* Population deviations that are "significant" can be justified on the basis of other legitimate criteria but as it relates to state districts, population deviations under 10% generally require no justification. *See generally Response to Proposed Conclusion of Law 519*; *Gaffney*, 412 U.S. at 750; *White*, 412 U.S. at 764; *Brown*, 462 U.S. at 842; *Frank*, 194 F.Supp.2d at 874.**

520. Established redistricting criteria include contiguity, Wis. Const. art. IV, § 4; compactness, *id.*; respect for "county, precinct, town or ward lines," *id.*; maintaining communities of interest, *Baumgart*, 2002 WL 34127471, at *3; and core population retention, *id*.

Response: **The phrase "established redistricting" criteria is vague, confusing and not helpful. The Wisconsin Constitution requires that state assembly districts be "bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable," Wis. Const. Art. 4, § 4, and that state senate districts be comprised of whole assembly districts and "convenient contiguous territory," Wis. Const., Art. 4, § 5. However, this Court lacks jurisdiction to entertain any claim that these provisions have been violated. *Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 117 (1984). Maintaining communities of interest and core population retention are legitimate considerations that can justify substantial population deviations but neither is constitutionally mandated. *Shaw v. Reno*, 509 U.S. 630, 647 (1993). *Baumgart* does not hold otherwise. *Baumgart v. Wendelberger*, 2002 WL 34127471, at *3 (E.D. Wis. May 30, 2002) ("federal courts have accepted some deviation from perfect population equality to comply with 'traditional' redistricting criteria").**

521. The failure to honor traditional redistricting criteria shifts the burden to defendants to justify the legitimacy of the legislative districts.

Response: **Plaintiffs have cited no authority in support of this proposition as none exists. The "traditional redistricting criteria" are what defendants can use to justify population deviations *if* a plaintiff first makes a showing that there are population deviations for which justification is needed. *Frank*, 194 F.Supp.2d at 874 (burden to justify variance does not shift to defendant until plaintiff makes showing of a greater than 10% population deviation); *Baumgart*, 2002 WL 34127471, at *3. In the case of state districts, the plaintiff generally must show a population deviation of more than 10% in order to shift the burden to the state to provide a justification. *Gaffney*, 412 U.S. at 750; *White*, 412 U.S. at 764; *Brown*, 462 U.S. at 842; *Frank*, 194 F.Supp.2d at 874. There is no such thing as a viable, free-standing claim for lack of compactness, lack of contiguity or failure to maintain communities of interest or core populations under the U.S. Constitution. *See*, *e.g.*, *Gorrell v. O'Malley*, 2012 WL 226919 (D. Md. Jan. 19, 2012)**

Although the Wisconsin Constitution requires that state assembly districts be "bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable," Wis. Const. Art. 4, § 4, and that state senate districts be comprised of whole assembly districts and "convenient contiguous territory," Wis. Const., Art. 4, § 5, this Court lacks jurisdiction to entertain any claim that these provisions have been violated. *Pennhurst,* 465 U.S. at 117.

522. Act 43 unnecessarily divides municipalities between legislative districts and otherwise divides communities of interest.

Response: **This is a conclusion of fact not law and defendants dispute it for the reasons set forth in their responses to plaintiffs' statements of contested facts. Moreover, it is not relevant to the outcome of this case.**

523. Act 43 shifts substantially more people between legislative districts than necessary.

Response: **This is a conclusion of fact not law and in any event, it is not relevant to the outcome of this case. To the extent determined to be material, defendants may rely on the testimony of Dr. Gaddie.**

524. Deviations from population equality in the assembly and senate districts cannot be justified by legitimate considerations and, therefore, violate the Equal Protection Clause.

Response: **There are no population deviations for which justification is necessary. Population deviations under 10% generally require no justification. *See generally Response to Proposed Conclusion of Law 519*; *Gaffney*, 412 U.S. at 750; *White*, 412 U.S. at 764; *Brown*, 462 U.S. at 842; *Frank*, 194 F.Supp.2d at 874. The parties have stipulated that the maximum deviation for assembly districts is 0.76%, while the maximum deviation rate for senate districts is 0.62%. *Joint Pretrial Rpt.*, dkt # 158, at ¶ 154. Even were justification required, defendants dispute that there is none sufficient to justify the extremely narrow population deviations here.**

525. "[R]espect for the prerogatives of the Wisconsin Constitution dictate that . . . municipalities be kept whole where possible." *Baumgart*, 2002 WL 34127471, at *3.

Response: **The Wisconsin Constitution requires that *assembly* districts "be bounded by county, precinct, town or ward lines . . . and be in as compact form as practicable." Wis. Const. art. IV, § 4. This Court lacks jurisdiction to entertain any claim that this provision has been violated. *Pennhurst,* 465 U.S. at 117.**

526. By splitting municipalities without any rational basis for doing so, Act 43 violates the Equal Protection Clause.

Response: **Plaintiffs cite no authority and none exists. "[C]ompactness, contiguity, and respect for political subdivisions … are important not because they are constitutionally required—*they are not*—but because they are objective factors that may serve to defeat a claim [of unconstitutional redistricting]" *Shaw v. Reno*, 509 U.S. 630, 647 (1993). Accordingly, splitting municipalities, whether with or without a rational basis, does not violate equal protection. *See id.*; *Gorrell*, 2012 WL 226919 (no such thing as an independent constitutional claim for not preserving communities of interest because not constitutionally mandated).**

527. Legislative districts that unnecessarily divide municipalities or are not compact violate the Wisconsin Constitution.

Response: **The Wisconsin Constitution requires that *assembly* districts "be bounded by county, precinct, town or ward lines . . . and be in as compact form as practicable." Wis. Const. art. IV, § 4. This Court lacks jurisdiction to entertain any claim that this provision has been violated. *Pennhurst,* 465 U.S. at 117.**

528. Act 43 unnecessarily divides municipalities between assembly districts in violation of the Wisconsin Constitution.

Response: **Act 43 does not unnecessarily divide municipalities between assembly districts and even if it did this Court lacks jurisdiction to entertain any claim that the Wisconsin Constitution has been violated. *Pennhurst,* 465 U.S. at 117.**

529. To the extent it relies exclusively on Act 39's permissive use of other boundaries (including census blocks), Act 43 violates Article IV, § 4 of the Wisconsin Constitution.

Response: **The Wisconsin Constitution requires that assembly districts "be bounded by county, precinct, town *or ward lines*. . ." Wis. Const. art. IV, § 4. Before any election is held, the districts in Act 43 will be bound by ward lines and thus, in compliance with Article IV, § 4 of the Wisconsin Constitution because Act 39 requires that local units draw wards to accommodate the districts. In any event, this Court lacks jurisdiction to entertain any claim that the Wisconsin Constitution has been violated. *Pennhurst,* 465 U.S. at 117.**

530. A *prima facie* case of unconstitutional gerrymandering is established by showing that the redistricting legislation moved significantly more people than necessary to achieve the ideal population, and no traditional redistricting criteria can justify the movement.

Response: **No workable standard exists with which to evaluate a partisan gerrymandering claim or measure the purported burden of an alleged partisan gerrymander on representational rights. *Vieth v. Jubelirer*, 541 U.S. 267, 313 (2004) (Kennedy, J., concurring). The burden is on the plaintiffs to "show a burden, as measured by a reliable standard, on the complainants' representational rights." *LULAC v. Perry*, 548 U. S. 399, 418 (2006). The plaintiffs' proposed standard is not manageable, is not discernible from the Constitution, and is virtually identical to standards previously rejected by the Supreme Court. *Vieth*, 541 U.S. at 296 (plurality opinion); *id.* at 308 (Kennedy, J., concurring); *see also See Intvervenor-Defs' Reply Br. In Supp. Of Mot. For Judg. On Pleadings*, dkt. # 115, at 6-16; *Defs.' Br. In Supp. Mot. For Summ Judg.*, dkt # 129, at 14-20.**

531. Defendants can rebut the *prima facie* case by showing that the movement was necessitated by justified changes in other district boundaries or by traditional redistricting criteria.

Response: **No workable standard exists with which to evaluate a partisan gerrymandering claim or measure the purported burden of an alleged partisan gerrymander on representational rights. *Vieth*, 541 U.S. at 313 (Kennedy, J., concurring). The burden is on the plaintiffs to "show a burden, as measured by a reliable standard, on the complainants' representational rights." *LULAC*, 548 U.S. at 418. The plaintiffs' proposed standard is not manageable, is not discernible from the Constitution, and is virtually identical to standards previously rejected by the Supreme Court. *Vieth*, 541 U.S. at 296 (plurality opinion); *id.* at 308 (Kennedy, J., concurring); *see also See Intvervenor-Defs' Reply Br. In Supp. Of Mot. For Judg. On***

***Pleadings*, dkt. # 115, at 6-16; *Defs.' Br. In Supp. Mot. For Summ Judg.*, dkt # 129, at 14-20.**

532. Plaintiffs can sustain their burden of proving an unconstitutional gerrymander by establishing that defendants' explanations are pretextual or unfounded.

***Response:* No workable standard exists with which to evaluate a partisan gerrymandering claim or measure the purported burden of an alleged partisan gerrymander on representational rights. *Vieth*, 541 U.S. at 313 (Kennedy, J., concurring). The burden is on the plaintiffs to "show a burden, as measured by a reliable standard, on the complainants' representational rights." *LULAC*, 548 U.S. at 418. The plaintiffs' proposed standard is not manageable, is not discernible from the Constitution, and is virtually identical to standards previously rejected by the Supreme Court. *Vieth*, 541 U.S. at 296 (plurality opinion); *id.* at 308 (Kennedy, J., concurring); *see also See Intvervenor-Defs' Reply Br. In Supp. Of Mot. For Judg. On Pleadings*, dkt. # 115, at 6-16; *Defs.' Br. In Supp. Mot. For Summ Judg.*, dkt # 129, at 14-20.**

533. Acts 43 and 44 move significantly more people than necessary to achieve the ideal population, and no traditional redistricting criteria can justify the movement.

***Response:* No workable standard exists with which to evaluate a partisan gerrymandering claim or measure the purported burden of an alleged partisan gerrymander on representational rights. *Vieth*, 541 U.S. at 313 (Kennedy, J., concurring). The burden is on the plaintiffs to "show a burden, as measured by a reliable standard, on the complainants' representational rights." *LULAC*, 548 U.S. at 418. The plaintiffs' proposed standard is not manageable, is not discernible from the Constitution, and is virtually identical to standards previously rejected by the Supreme Court. *Vieth*, 541 U.S. at 296 (plurality opinion); *id.* at 308 (Kennedy, J., concurring). No standard such as that suggested by this proposed conclusion of law exists for the review of the constitutionality of an enacted congressional redistricting statute. *Id.* The multitude of considerations to be taken into account in drawing congressional district boundaries does not permit the conclusion suggested by this proposed conclusion of law. *See Intvervenor-Defs' Reply Br. In Supp. Of Mot. For Judg. On Pleadings*, dkt. # 115, at 6-16; *Defs.' Br. In Supp. Mot. For Summ Judg.*, dkt # 129, at 14-20.**

534. The movement of significantly more people than necessary to achieve population equality was not necessitated by justified changes in other district boundaries or by traditional redistricting criteria.

***Response:* No workable standard exists with which to evaluate a partisan gerrymandering claim or measure the purported burden of an alleged partisan gerrymander on representational rights. *Vieth*, 541 U.S. at 313 (Kennedy, J., concurring). The burden is on the plaintiffs to "show a burden, as measured by a reliable standard, on the complainants' representational rights." *LULAC*, 548 U.S. at 418. The plaintiffs' proposed standard is not manageable, is not discernible from**

the Constitution, and is virtually identical to standards previously rejected by the Supreme Court. *Vieth*, 541 U.S. at 296 (plurality opinion); *id.* at 308 (Kennedy, J., concurring). No standard such as that suggested by this proposed conclusion of law exists for the review of the constitutionality of an enacted congressional redistricting statute. *Id.* The multitude of considerations to be taken into account in drawing congressional district boundaries does not permit the conclusion suggested by this proposed conclusion of law. *See Intervenor-Defs' Reply Br. In Supp. Of Mot. For Judg. On Pleadings*, dkt. # 115, at 6-16; *Defs.' Br. In Supp. Mot. For Summ Judg.*, dkt # 129, at 14-20.

535. The districts created by Acts 43 and 44 constitute an unconstitutional partisan gerrymander in violation of the Equal Protection Clause.

***Response:* No workable standard exists with which to evaluate a partisan gerrymandering claim or measure the purported burden of an alleged partisan gerrymander on representational rights. *Vieth*, 541 U.S. at 313 (Kennedy, J., concurring). The burden is on the plaintiffs to "show a burden, as measured by a reliable standard, on the complainants' representational rights." *LULAC*, 548 U.S. at 418. The plaintiffs' proposed standard is not manageable, is not discernible from the Constitution, and is virtually identical to standards previously rejected by the Supreme Court. *Vieth*, 541 U.S. at 296 (plurality opinion); *id.* at 308 (Kennedy, J., concurring). Defendants and intervenor-defendants have explained, in previous filings in this case, some of the reasons why Act 44 is constitutional. *See Intervenor-Defs' Reply Br. In Supp. Of Mot. For Judg. On Pleadings*, dkt. # 115; *Defs.' Br. In Supp. Mot. For Summ Judg.*, dkt # 129.**

536. Wisconsin voters have the right to vote in regularly scheduled representative elections for state senators every four years. Wis. Const. art. IV, § 5.

***Response:* The Wisconsin constitution provides that "senators shall be chosen alternately from the odd and even numbered districts for the term of 4 years." Wis. Const., Art. III, § 5. Nothing in Act 43 purports to change this rule--state senators will continue to be chosen alternately from the odd and even numbered districts for the term of 4 years. The Wisconsin Supreme Court, the ultimate arbiter of the meaning of the Wisconsin Constitution, has held that the mere fact that redistricting results in some voters having to wait six years to vote in a state senate election, while some others will get to vote with only a two year gap, does not give rise to a violation of the Wisconsin Constitution. *State ex rel. Attorney General v. Cunningham*, 81 Wis. 440, 468, 51 N.W. 724 (1892); *see also AFL-CIO v. Elections Board*, 543 F.Supp. 630, 659 (E.D. Wis. 1982) (describing argument challenging six year gap as "a house of cards that collapses when exposed to even the gentle breeze of cursory analysis"). Moreover, this Court lacks jurisdiction to entertain any claim in this case that a provision of the Wisconsin Constitution has been violated. *Pennhurst,* 465 U.S. at 117.**

537. Voters moved from an even-numbered senate district, in which the last regular election was held in 2008, to an odd-numbered senate district, in which the next regular election

is to be held in 2014, are deprived of the right to vote in a regular election for two additional years.

Response: **The Wisconsin constitution provides that "senators shall be chosen alternately from the odd and even numbered districts for the term of 4 years." Wis. Const., Art. III, § 5. Nothing in Act 43 purports to change this rule--state senators will continue to be chosen alternately from the odd and even numbered districts for the term of 4 years. The Wisconsin Supreme Court, the ultimate arbiter of the meaning of the Wisconsin Constitution, has held that the mere fact that redistricting results in some voters having to wait six years to vote in a state senate election, while some others will get to vote with only a two year gap, does not give rise to a violation of the Wisconsin Constitution. *State ex rel. Attorney General*, 81 Wis. at 468; *see also AFL-CIO*, 543 F.Supp. at 659. Moreover, this Court lacks jurisdiction to entertain any claim in this case that a provision of the Wisconsin Constitution has been violated. *Pennhurst,* 465 U.S. at 117.**

538. The two-year delay in the exercise of their right to vote in regularly scheduled representative elections temporarily disenfranchises voters.

Response: **The Wisconsin constitution provides that "senators shall be chosen alternately from the odd and even numbered districts for the term of 4 years." Wis. Const., Art. III, § 5. Nothing in Act 43 purports to change this rule--state senators will continue to be chosen alternately from the odd and even numbered districts for the term of 4 years. The Wisconsin Supreme Court, the ultimate arbiter of the meaning of the Wisconsin Constitution, has held that the mere fact that redistricting results in some voters having to wait six years to vote in a state senate election, while some others will get to vote with only a two year gap, does not give rise to a violation of the Wisconsin Constitution. *State ex rel. Attorney General*, 81 Wis. at 468; *see also AFL-CIO*, 543 F.Supp. at 659. Moreover, this Court lacks jurisdiction to entertain any claim in this case that a provision of the Wisconsin Constitution has been violated. *Pennhurst,* 465 U.S. at 117.**

539. "[A] redistricting plan cannot unnecessarily disenfranchise voters." Order Denying Defendants' Motion to Dismiss (Dkt. 25) at 6. The temporary disenfranchisement of citizens is constitutionally tolerated only when, due to the complexities of the reapportionment process, the "delay" in the right to vote is an "absolute necessity" or is "unavoidable." *Republican Party of Wisconsin v. Elections Bd.*, 585 F. Supp. 603, 606 (E.D. Wis. 1984), *vacated and remanded for dismissal of complaint*, *Wisconsin Elections Bd. v. Republican Party of Wisconsin*, 469 U.S. 1081 (1984). The disenfranchisement of more voters than necessary is a "fatal flaw" that renders a redistricting plan unconstitutional. *Id.*

Response: **The Wisconsin constitution provides that "senators shall be chosen alternately from the odd and even numbered districts for the term of 4 years." Wis. Const., Art. III, § 5. Nothing in Act 43 purports to change this rule--state senators will continue to be chosen alternately from the odd and even numbered districts for the term of 4 years. The Wisconsin Supreme Court, the ultimate arbiter of the meaning of the Wisconsin Constitution, has held that the mere fact that redistricting**

results in some voters having to wait six years to vote in a state senate election, while some others will get to vote with only a two year gap, does not give rise to a violation of the Wisconsin Constitution. *State ex rel. Attorney General v. Cunningham*, 81 Wis. at 468; *see also AFL-CIO*, 543 F.Supp. at 659.

Plaintiffs reliance on *Republican Party of Wisconsin v. Elections Board*, 585 F.Supp. 603 (E.D. Wis. 1984) is misplaced. The U.S. Supreme Court vacated that opinion, 469 U.S. 1081 (1984), leaving it with no precedential value. Even had it not been, the court's opinion in that case reveals that the meaning of the term unnecessary refers to the necessity for the underlying act. *Id.* at 605-06 ("had the Legislature enacted a reapportionment plan similar to its '83 effort before the November 1982 elections, we would have no trouble sustaining its validity against a constitutional challenge"). Moreover, this Court lacks jurisdiction to entertain any claim in this case that a provision of the Wisconsin Constitution has been violated. *Pennhurst,* 465 U.S. at 117.

540. Act 43 temporarily disenfranchises 299,639 individuals by moving them from even districts to odd districts.

***Response:* Defendants admit that 299,639 individuals were moved from even to odd districts but deny that this amounts to a "temporary disenfranchisement." Defendants further note that a total of 164,843 persons who reside in districts in which they would otherwise experience delayed voting also lived in districts where a recall was conducted in 2011. *Joint Final Pretrial Report*, dkt. # 158, at ¶ 396. Accounting for the use of the recall, the actual period between voting for a Senator for these 164,843 persons is just three years, not six. *Id.* Thus, Act 43 will cause only 134,861 persons to wait six years between opportunities to vote for a Senator. *Id.* This figure is significantly smaller than the number of citizens who had to wait six years to vote under the court drawn plans of 1982 (713,225), 1992 (257,000) and 2002 (171,163). *Id.* at ¶¶ 397-400, table 17.**

541. The temporary disenfranchisement of a significant number of the 299,639 individuals was unnecessary and avoidable and, without an appropriate explanation, a violation of the Equal Protection Clause.

***Response:* Defendants incorporate by reference their responses to proposed conclusions nos. 539 and 540.**

542. The fact that some of these voters had or may have an opportunity to vote in an extraordinary recall election does not cure the constitutional violation. The Wisconsin constitution guarantees the right to vote in a regularly scheduled state senate election every four years. The right to vote every four years for a state senator cannot be denied based on the exercise of the separate constitutional right to petition for the recall of an incumbent elected official.

***Response:* Even if the Wisconsin Constitution did create a right to vote for state senator every four years, and the Wisconsin Supreme Court has held that it doesn't,**

***State ex rel. Attorney General*, 81 Wis. at 468, plaintiffs offer no reasoned justification why a citizen who experiences only a three-year gap between state senate elections could possibly be deemed to have been deprived of a right to vote every four years simply because one of the elections in which he or she voted was a special election. Moreover, this Court lacks jurisdiction to entertain any claim in this case that a provision of the Wisconsin Constitution has been violated. *Pennhurst,* 465 U.S. at 117.**

543. Section 2 of the Voting Rights Act, as amended, provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right . . . to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided by subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.
>
> 42 U.S.C. § 1973.

***Response:* Undisputed.**

546. The Latino citizen voting age population in the City of Milwaukee is sufficiently large and geographically compact to permit the creation of a majority-minority district. The Latino citizen voting age population in the City of Milwaukee is "politically cohesive," meaning that its members vote in a similar fashion, and there is evidence of racial-bloc voting (*i.e.*, racially polarized voting), in which the Latino citizen voting age population tends to vote as a bloc, usually allowing majority voters to defeat its preferred candidates. *See Thornburg v. Gingles*, 478 U.S. 30, 48-51 (1986); *see also Growe v. Emison*, 507 U.S. 25, 401-41 (1993).

Response: **This is a conclusion of fact not law and defendants dispute it for the reasons set forth in their statements of contested facts, *Joint Final Pretrial Report*, dkt. # 158, ¶¶ 406-447, and their responses to plaintiffs' statements of contested facts filed contemporaneously herewith. Defendants further assert that the assertions made are immaterial for the reasons set forth in their motion for summary judgment. *Defs.' Br. In Supp. Mot. For Summ Judg.*, dkt # 129 at 21-26.**

547. The African-American voting age population in the City of Milwaukee is "politically cohesive," meaning that its members vote in a similar fashion, and there is evidence of racial-bloc voting (*i.e.*, racially polarized voting), in which the African-American voting age population tends to vote as a bloc, usually allowing majority voters to defeat its preferred candidates. *See id.*

Response: **This is a conclusion of fact not law and defendants dispute it for the reasons set forth in their statements of contested facts, *Joint Final Pretrial Report*, dkt. # 158, ¶¶ 406-447, and their responses to plaintiffs' statements of contested facts filed contemporaneously herewith. Defendants further assert that the assertions made are immaterial for the reasons set forth in their motion for summary judgment. *Defs.' Br. In Supp. Mot. For Summ Judg.*, dkt # 129 at 21-26.**

548. The Latino citizen voting age populations dispersed in Assembly Districts 8 and 9, as created by Act 43, are insufficient to create an effective Latino majority. *See Barnett v. City of Chicago*, 141 F.3d 699, 703 (7th Cir. 1998); *Ketchum v. Byrne*, 740 F.2d 1398, 1415 n.19 (7th Cir. 1984).

Response: **This is a conclusion of fact not law and defendants dispute it for the reasons set forth in their statements of contested facts, *Joint Final Pretrial Report*, dkt. # 158, ¶¶ 406-447, and their responses to plaintiffs' statements of contested facts filed contemporaneously herewith. Defendants further assert that the assertions made are immaterial for the reasons set forth in their motion for summary judgment. *Defs.' Br. In Supp. Mot. For Summ Judg.*, dkt # 129 at 21-26.**

549. It is possible to create an Assembly District 8 that is compact and has a Latino total population and citizen voting age population sufficient to elect a candidate of their choice.

Response: **This is a conclusion of fact not law and defendants dispute it for the reasons set forth in their statements of contested facts, *Joint Final Pretrial Report*, dkt. # 158, ¶¶ 406-447, and their responses to plaintiffs' statements of contested facts filed contemporaneously herewith. Defendants further assert that the assertions made are immaterial for the reasons set forth in their motion for summary judgment. *Defs.' Br. In Supp. Mot. For Summ Judg.*, dkt # 129 at 21-26.**

550. Either by intent or effect, Act 43 packs the African-American voting age population in the City of Milwaukee into six (6) Assembly Districts, a smaller number of districts than is necessary, with unnecessarily high concentrations to minimize their voting power in neighboring districts. *See Voinovich v. Quilter*, 507 U.S. 146, 158 (1993).

Response: **This is a conclusion of fact not law and defendants dispute it for the reasons set forth in their statements of contested facts, *Joint Final Pretrial Report*, dkt. # 158, ¶¶ 406-447, and their responses to plaintiffs' statements of contested facts filed contemporaneously herewith. Defendants further assert that the assertions made are immaterial for the reasons set forth in their motion for summary judgment. *Defs.' Br. In Supp. Mot. For Summ Judg.*, dkt # 129 at 21-26. Whether or not a seventh "influence district" could be created is irrelevant; this does not create a claim under the Voting Rights Act. *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009) (plurality).**

551. If the percentage of African-American voting age population is reduced in each of these districts, thousands more African-American voters would be available for other districts, while still retaining effective majorities in the existing majority-minority districts and enhancing the influence of African-Americans in other districts.

Response: **This is a conclusion of fact not law and defendants dispute it for the reasons set forth in their statements of contested facts, *Joint Final Pretrial Report*, dkt. # 158, ¶¶ 406-447, and their responses to plaintiffs' statements of contested facts filed contemporaneously herewith. Defendants further assert that the assertions made are immaterial for the reasons set forth in their motion for summary judgment. *Defs.' Br. In Supp. Mot. For Summ Judg.*, dkt # 129 at 21-26. Whether or not a seventh "influence district" could be created is irrelevant; this does not create a claim under the Voting Rights Act. *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009) (plurality).**

552. The process by which Act 43 was created and the legislature's disregard for traditional redistricting criteria, such as communities of interest, demonstrate intentional dilution of minority voting strength for African-Americans and Latinos. *See Bartlett v. Strickland*, 556 U.S. 1, 19-20 (2009); *see Ketchum,* 740 F.2d at 1406.

Response: **This is a conclusion of fact not law and defendants dispute it for the reasons set forth in their statements of contested facts, *Joint Final Pretrial Report*, dkt. # 158, ¶¶ 406-447, and their responses to plaintiffs' statements of contested facts filed contemporaneously herewith. Defendants further assert that the assertions made are immaterial for the reasons set forth in their motion for summary judgment. *Defs.' Br. In Supp. Mot. For Summ Judg.*, dkt # 129 at 21-26.**

553. Latinos are less likely to participate in elections as demonstrated by the disparity in voter registration rates, socioeconomic differences, and other barriers to electoral participation—including Wisconsin's newly enacted voter identification law. *See Gingles*, 478 U.S. at 44-45; *see* 2011 Wis. Act 23.

Response: **This is a conclusion of fact not law and defendants dispute it for the reasons set forth in their statements of contested facts, *Joint Final Pretrial Report*, dkt. # 158, ¶¶ 406-447, and their responses to plaintiffs' statements of contested facts filed contemporaneously herewith. Defendants further assert that the assertions**

made are immaterial for the reasons set forth in their motion for summary judgment. *Defs.' Br. In Supp. Mot. For Summ Judg.*, dkt # 129 at 21-26.

554. African-Americans in Milwaukee and Wisconsin are less likely to participate in election as demonstrated by the disparity in voter registration rates, socioeconomic differences, and other barriers to electoral participation. *See id.*

***Response:* This is a conclusion of fact not law and defendants dispute it for the reasons set forth in their statements of contested facts, *Joint Final Pretrial Report*, dkt. # 158, ¶¶ 406-447, and their responses to plaintiffs' statements of contested facts filed contemporaneously herewith. Defendants further assert that the assertions made are immaterial for the reasons set forth in their motion for summary judgment. *Defs.' Br. In Supp. Mot. For Summ Judg.*, dkt # 129 at 21-26.**

555. Based on the totality of the circumstances, Latinos have been denied an equal opportunity to participate in the political process and elect legislators of their choice because Act 43 dilutes the voting power of Latinos by reducing their concentration in the newly drawn Assembly District 8, especially as compared with Assembly District 8 created by the 2002 judicially-imposed plan. *See* 42 U.S.C. § 1973(b); *see also Gingles*, 478 U.S. at 46.

***Response:* This is a conclusion of fact not law and defendants dispute it for the reasons set forth in their statements of contested facts, *Joint Final Pretrial Report*, dkt. # 158, ¶¶ 406-447, and their responses to plaintiffs' statements of contested facts filed contemporaneously herewith. Defendants further assert that the assertions made are immaterial for the reasons set forth in their motion for summary judgment. *Defs.' Br. In Supp. Mot. For Summ Judg.*, dkt # 129 at 21-26.**

556. Based on the totality of the circumstances, African-Americans in the City of Milwaukee and in Wisconsin have been denied an equal opportunity to participate in the political process and elect legislators of their choice because Act 43 dilutes their voting power by packing them into a smaller number of districts than is necessary. *See id.*

***Response:* This is a conclusion of fact not law and defendants dispute it for the reasons set forth in their statements of contested facts, *Joint Final Pretrial Report*, dkt. # 158, ¶¶ 406-447, and their responses to plaintiffs' statements of contested facts filed contemporaneously herewith. Defendants further assert that the assertions made are immaterial for the reasons set forth in their motion for summary judgment. *Defs.' Br. In Supp. Mot. For Summ Judg.*, dkt # 129 at 21-26.**

557. Although the Voting Rights Act necessitates, under narrow circumstances, that the legislature consider race in the redistricting context, the Equal Protection Clause of the 14th Amendment generally requires racial neutrality in governmental decision-making. *See* U.S. Const., amend. XIV, § 1 (providing that no State shall "deny to any person within its jurisdiction the equal protection of the laws").

***Response:* Undisputed.**

558. The Supreme Court has repeatedly held that dividing voters according to their race in the redistricting context is subject to the strictures of the Equal Protection Clause. *See Shaw v. Hunt*, 517 U.S. 899, 904-05 (1996) ("*Shaw II* "); *Miller v. Johnson*, 515 U.S. 900, 905 (1995); *Shaw I*, 509 U.S. at 644.

Response: **Undisputed but incomplete. "Applying traditional equal protection principles in the voting-rights context is 'a most delicate task' . . . because a legislature may be conscious of the voters' races without using race as a basis for assigning voters to districts." *Shaw v. Hunt*, 517 U.S. 899, 905 (1996) (quoting *Miller v. Johnson*, 515 U.S. 900, 905 (1995)). As such, "[t]he constitutional wrong occurs when race becomes the 'dominant and controlling' consideration." Id. (quoting *Miller*, 515 U.S. at 915-16). In such cases, the plaintiff bears the burden of proving that race was the "dominant and controlling" consideration for assigning voters to districts with either "'circumstantial evidence of a district's shape and demographics' or through 'more direct evidence going to legislative purpose.'" *Id.* (quoting *Miller* at 916).**

559. Racial gerrymandering presents a justiciable claim under the Equal Protection Clause, even when there is no population deviation among the districts or direct evidence of intentional discrimination. *Davis v. Bandemer*, 478 U.S. 109 (1985) (*citing Rogers v. Lodge*, 458 U.S. 613 (1982)).

Response: **Undisputed but incomplete. "Applying traditional equal protection principles in the voting-rights context is 'a most delicate task' . . . because a legislature may be conscious of the voters' races without using race as a basis for assigning voters to districts." *Shaw v. Hunt*, 517 U.S. 899, 905 (1996) (quoting *Miller v. Johnson*, 515 U.S. 900, 905 (1995)). As such, "[t]he constitutional wrong occurs when race becomes the 'dominant and controlling' consideration." *Id.* (quoting *Miller*, 515 U.S. at 915-16). In such cases, the plaintiff bears the burden of proving that race was the "dominant and controlling" consideration for assigning voters to districts with either "'circumstantial evidence of a district's shape and demographics' or through 'more direct evidence going to legislative purpose.'" *Id.* (quoting *Miller* at 916).**

560. Act 43 violates the Equal Protection Clause because, absent a race-neutral explanation, race was the predominant factor motivating the legislature's decision to place a significant number of African-American and Latino voters within or without particular districts. *See Miller v. Johnson*, 515 U.S. 900, 916 (1995).

Response: **This is predominantly a conclusion of fact not law and defendants dispute it for the reasons set forth in their statements of contested facts, *Joint Final Pretrial Report*, dkt. # 158, ¶¶ 406-503, and their responses to plaintiffs' statements of contested facts filed contemporaneously herewith. To the extent this proposed conclusion suggests that plaintiffs can meet their burden of proving that race was the "dominant and controlling" consideration for assigning voters to districts without "'circumstantial evidence of a district's shape and demographics' or through 'more direct evidence going to legislative purpose.'" *Shaw*, 517 U.S. at 905**

(quoting *Miller* at 916). An inference of racially motivated redistricting cannot be negatively inferred; there must be affirmative evidence to support such a claim. *Miller*, 515 U.S. at 915 ("until a claimant makes a showing sufficient to support that allegation[,] the good faith of a state legislature must be presumed").

561. Plaintiffs have demonstrated the impermissible motives of the majority party of the legislature through, at the least, circumstantial evidence of the shape and demographics of the minority districts at issue, and the secrecy and inexplicable speed of the redistricting process. *See id.*

***Response:* This is a conclusion predominantly of fact not law and defendants dispute it for the reasons set forth in their statements of contested facts, *Joint Final Pretrial Report*, dkt. # 158, ¶¶ 406-503, and their responses to plaintiffs' statements of contested facts filed contemporaneously herewith.**

562. Traditional race-neutral redistricting criteria, such as compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, were subordinated to race, and the legislature deliberately concealed the redistricting process from the public. *See Miller*, 515 U.S. at 920; *see also Shaw v. Reno*, 509 U.S. 630, 646 (1993) (*Shaw I*).

***Response:* This is a conclusion predominantly of fact not law and defendants dispute it for the reasons set forth in their statements of contested facts, *Joint Final Pretrial Report*, dkt. # 158, ¶¶ 406-503, and their responses to plaintiffs' statements of contested facts filed contemporaneously herewith.**

563. With respect to race, Act 43 is not justified by any compelling state interest, and is not narrowly tailored to achieve that interest. *See Miller*, 515 U.S. at 920; *Shaw I*, 509 U.S. at 646.

***Response:* This is a conclusion predominantly of fact not law and defendants dispute it for the reasons set forth in their statements of contested facts, *Joint Final Pretrial Report*, dkt. # 158, ¶¶ 406-503, and their responses to plaintiffs' statements of contested facts filed contemporaneously herewith.**

564. Section 10 of 2011 Act 43 states: "(1) This act first applies, with respect to regular elections, to offices filled at the 2012 general election. (2) This act first applies, with respect to special or recall elections, to offices filled or contested concurrently with the 2012 general election." 2011 Wis. Act 43.

***Response:* Undisputed.**

565. The Wisconsin Constitution permits legislative redistricting only after a decennial census. Wis. Const. art. IV, § 3.

***Response:* The Wisconsin Constitution *mandates* legislative redistricting only after a decennial census. Wis. Const. art. IV, § 3.**

566. Where a state statute provides for redistricting after a decennial census, it may not impose an interim remedy to address subsequent population changes that allegedly render the redistricting invalid. *See Mississippi State Conf. of N.A.A.C.P. v. Barbour*, No. 11-cv-159, 2011 WL 1870222, *2, *6-*8 (S.D. Miss. May 16, 2011), *summarily aff'd*, 132 S. Ct. 542 (Oct. 31, 2011); *see also Holt v. 2011 Legislative Reapportionment Comm'n*, No. 7 MM 2012 (Pa. Jan. 25, 2012).

Response: **The cases cited provide absolutely no support for the proposition asserted and defendants are aware of no authority or logical reason why this would be unlawful. *Mississippi State Conf. of N.A.A.C.P. v. Barbour*, No. 11-cv-159, 2011 WL 1870222, *2, *6-*8 (S.D. Miss. May 16, 2011) (holding that state *need not* enact an interim plan and not that it *can not*: "courts generally have accepted that some lag-time between the release of census data and the reapportionment of a state's legislative districts is both necessary and constitutionally acceptable, even when it results in elections based on malapportioned districts in the years that census data are released"); *Holt v. 2011 Legislative Reapportionment Comm'n*, No. 7 MM 2012 (Pa. Feb 3, 2012) (holding that provisions unique to the Pennsylvania State Constitution prevent reapportionment plans from having the force of law until all appeals are decided) (citing Pa. Const., Art. II, § 17(e)).**

567. The Government Accountability Board has concluded, based on the plain language of Act 43, that any special or recall elections to offices filled or contested prior to the fall 2012 elections are to be conducted in the legislative districts established by the 2002 judicially-approved redistricting plan. *See* Tr. Ex. 186 (Memorandum Regarding Legislative Redistricting: Effective Date and Use of State Funds from Kevin J. Kennedy, Dir. and Gen. Counsel, Gov't Accountability Bd., to Robert Marchant, Senate Chief Clerk, and Patrick Fuller, Assembly Chief Clerk (Oct. 19, 2011), *available at* http://wispolitics.com/1006/111019_Chief_Clerk_Guidance.pdf.)

Response: **Undisputed but this leaves the court without jurisdiction over plaintiffs' claim seeking a declaration that the districts created by Act 43, if upheld, will not apply to any recall or other special elections taking place prior to the regular election scheduled for November 2012. The jurisdiction of federal courts to issue declaratory judgments is bounded by the requirement that there be a "substantial controversy, between parties having adverse legal interests." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007).**

568. Tens of thousands of recall petition signatures were submitted in direct reliance upon Section 10 of 2011 Act 43 and the defendants' own opinion. *See Friends of Scott Walker v. Brennan*, No. 2012AP32-AC (Wis. Ct. App. Feb. 3, 2012).

Response: **This is a conclusion predominantly of fact not law. Defendants have no knowledge regarding the reliance of those submitting recall petitions.**

569. Any recall or special elections must be conducted under the 2002 boundaries established by this Court.

Response: **Defendants have no current dispute with this assertion but this leaves the court without jurisdiction over plaintiffs' claim seeking a declaration that the districts created by Act 43, if upheld, will not apply to any recall or other special elections taking place prior to the regular election scheduled for November 2012. The jurisdiction of federal courts to issue declaratory judgments is bounded by the requirement that there be a "substantial controversy, between parties having adverse legal interests." *MedImmune,* 549 U.S. at 127.**

570. In amending their answer to plaintiffs' Second Amended Complaint (*see* Dkt. 66), defendants continued to deny plaintiffs' claim that any recall or special elections must be conducted under the 2002 boundaries established by this Court (*see id., e.g.,* at paras. 100, 101) and requested relief on that question (*see id.* at request for affirmative relief para. 4). Furthermore, in answering a complaint in Waukesha County Circuit Court seeking a judicial determination of the appropriate districts under which recall elections must be held, *Clinard et al. v. Brennan et al.*, Case No. 11-cv-03995, the GAB has admitted an allegation that the 2002 district boundaries are now unconstitutionally malapportioned.

Response: **Defendants agree that the districts created by Act 43 will not apply to any recall or other special elections taking place prior to the regular election scheduled for November 2012 but do deny that plaintiffs have a viable claim for a declaratory judgment holding the same. The jurisdiction of federal courts to issue declaratory judgments is bounded by the requirement that there be a "substantial controversy, between parties having adverse legal interests." *MedImmune,* 549 U.S. at 127.**

571. There is a "case or controversy" within the meaning of the Declaratory Judgment Act concerning the constitutionality of applying the 2002 senate district boundaries to any recall elections that precede the November 2012 general election.

Response: **There is no case or controversy on the applicability of the Act 43 districts to special or recall elections. Defendants agree that the districts created by Act 43 will not apply to any recall or other special elections taking place prior to the regular election scheduled for November 2012 but do deny that plaintiffs have a viable claim for a declaratory judgment holding the same. The jurisdiction of federal courts to issue declaratory judgments is bounded by the requirement that there be a "substantial controversy, between parties having adverse legal interests." *MedImmune,* 549 U.S. at 127.**

572. Any arguments raised by defendants about the Court's authority to adjudicate state statutory or constitutional issues have been waived by defendants and are not supported by case law.

Response: **"[A] federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when-as here-the relief sought…has an impact directly on the State itself." *Pennhurst,* 465 U.S. at 117. Although sovereign immunity can be waived, it hasn't been in this case. *Pennhurst* was raised in multiple prior submissions. *See* dkt. # 60, at p. 8, 14; dkt. # 76 at 3; dkt. # 116 at 7; dkt # 129 at 4-5; *see also* dkt. # 66, at aff. Def. ¶ 12 (incorporating by reference all**

affirmative defenses alleged by intervenor-defendants which included sovereign immunity). Moreover, because "'federal jurisdiction over suits against unconsenting States was not contemplated by the Constitution when establishing the judicial power of the United States,'" *Sossamon v. Texas*, 563 U.S. ___, 131 S.Ct. 1651, 1657-58 (Apr. 20, 2011) (citation omitted), "[the] 'test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one.'" *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675-76 (1999) (citations omitted).

Federal courts should find waiver "only where stated 'by the most express language or by such overwhelming implications . . . as (will) leave no room for any other reasonable construction.'" *Edelman v. Jordan*, 415 U.S. 651, 673-74 (1974) (citations omitted). The *Baldus* plaintiffs have argued elsewhere that sovereign immunity has been waived, by implication, through litigation conduct. "The hallmark of whether a State has waived its Eleventh Amendment immunity in the context of litigation is the State's voluntary invocation of federal jurisdiction." *Pennsylvania, Dept. of Environmental Protection v. Lockheed Martin Corp.*, 731 F.Supp.2d 411, 415 (M.D. Pa. 2010); *see also College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676-77 (1999). This, defendants have not done here.

II. VOCES PLAINTIFFS

573. The division of the Latino community into two separate adjacent assembly districts dilutes the voting strength of the citizen voting age Latino voters well below 45 percent of all eligible voters in each district, thereby denying the Latino community an effective voting majority in either district.

***Response:* This is a conclusion of fact not law and defendants dispute it for the reasons set forth in their statements of contested facts, *Joint Final Pretrial Report*, dkt. # 158, ¶¶ 406-447, and their responses to plaintiffs' statements of contested facts filed contemporaneously herewith. Defendants further assert that the assertions made are immaterial for the reasons set forth in their motion for summary judgment. *Defs.' Br. In Supp. Mot. For Summ Judg.*, dkt # 129 at 21-26.**

574. The division of the Latino community into two separate adjacent but diluted assembly districts divides the Latino community's established business district in a way that fractures the cohesiveness of the community and ignores natural community boundaries.

***Response:* This is a conclusion of fact not law and defendants dispute it for the reasons set forth in their statements of contested facts, *Joint Final Pretrial Report*, dkt. # 158, ¶¶ 406-447, and their responses to plaintiffs' statements of contested facts filed contemporaneously herewith. Defendants further assert that the assertions made are immaterial for the reasons set forth in their motion for summary judgment. *Defs.' Br. In Supp. Mot. For Summ Judg.*, dkt # 129 at 21-26.**

575. The Voting Rights Act of 1965, 42 U.S.C. § 1973, precludes the State of Wisconsin from minimizing the opportunities for minority groups, including Latino citizens, to

participate in the political process and in the context of the recent reapportionment, said statute precludes the State from fracturing minorities into several districts to deprive them of an effective voting majority in situations where there exists a history of racially polarized voting.

Response: **The Voting Rights Act protects voting rights. It is unclear what "participate in the political process" is intended to mean. The second half of the proposed conclusion is similarly unclear. It is unclear whether it is intended to be an assertion that Act 43 violates the Voting Rights Act or that the Act always bars states from placing minorities into more than one district where there is a history of racially polarized voting (which there isn't here anyway) without regard to any other circumstance. Whichever construction was intended, neither is correct.**

576. The redistricting plan adopted by the Wisconsin Legislature on July 20, 2011, fails to create any assembly district with an effective Latino voting majority, despite the significant growth of the Latino community to such a degree that the creation of geographically compact district with an effective Latino voter majority is possible.

Response: **This is a conclusion of fact not law and defendants dispute it for the reasons set forth in their statements of contested facts, *Joint Final Pretrial Report*, dkt. # 158, ¶¶ 406-447, and their responses to plaintiffs' statements of contested facts filed contemporaneously herewith. Defendants further assert that the assertions made are immaterial for the reasons set forth in their motion for summary judgment. *Defs.' Br. In Supp. Mot. For Summ Judg.*, dkt # 129 at 21-26.**

577. The redistricting plan adopted by the Wisconsin Legislature on July 20, 2011, fractures the Latino community's voting strength by dividing the Latino community into two districts in which the Latino citizen voting age population is substantially below 50 percent of the voting age population.

Response: **This is a conclusion of fact not law and defendants dispute it for the reasons set forth in their statements of contested facts, *Joint Final Pretrial Report*, dkt. # 158, ¶¶ 406-447, and their responses to plaintiffs' statements of contested facts filed contemporaneously herewith. Defendants further assert that the assertions made are immaterial for the reasons set forth in their motion for summary judgment. *Defs.' Br. In Supp. Mot. For Summ Judg.*, dkt # 129 at 21-26.**

III. INTERVENOR PLAINTIFFS

A. Zero Deviation.

578. Census data accuracy has always been a legal fiction. (Defendant GAB Memorandum In Support of Motion For Protective Order, filed 01/16/12, page 4.)

Response: **Undisputed but incomplete and misleading in phrasing. Census data is not actually entirely accurate but because it is almost always the most accurate information available by a wide margin, it is accorded a legal fiction presuming it to be accurate. Specifically, federal census data is presumed accurate and a valid basis for congressional and legislative redistricting. *McNeil v. Springfield Park Dist.*, 851**

F.2d 937, 946 (7th Cir. 1988) ("[t]he census is presumed accurate until proven otherwise"); *Perez v. Pasadena Independent School Dist.*, 958 F.Supp. 1196, 1210 (S.D. Tex. 1997) ("the census figures are presumed accurate until proven otherwise"); *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1233 (Colo. 2003) ("[w]hen evaluating constitutionality under the one-person, one-vote doctrine, a court uses the national decennial census figures"). Not only is census data presumed accurate at the time it is released, the United States Supreme Court has approved reliance on a legal fiction that census data remains accurate for 10 years after it is taken. *League of United Latin American Citizens v. Perry,* 548 U.S. 399, 421 (2006) ("[s]tates operate under the legal fiction that their plans are constitutionally apportioned throughout the decade, a presumption that is necessary to avoid constant redistricting, with accompanying costs and instability"); *Georgia v. Ashcroft*, 539 U.S. 461, 489, n. 2 (2003) ("When the decennial census numbers are released, States must redistrict to account for any changes or shifts in population. But before the new census, States operate under the legal fiction that even 10 years later, the plans are constitutionally apportioned").

579. Exact population equality is unattainable and is not the only goal of redistricting. *Prosser v. Elections Bd.*, 793 F. Supp. 859, 864 (W.D. Wis. 1992).

***Response:* Undisputed that population equality is not the only goal of redistricting although not all of these goals are mandatory. *See Shaw*, 509 U.S. at 647. Undisputed that exact population equality is unattainable with respect to state legislative districts but dispute that it is unattainable with respect to congressional districts. "Act 44 apportions the census population of the State of Wisconsin perfectly into eight districts with a variance of one person." *Joint Final Pretrial Report*, dkt. # 158, at ¶ 191.**

580. A deviation of 1% of population between congressional districts is not legally or politically relevant. *Prosser*, *supra*, 793 F. Supp. at 866.

***Response:* With respect to *state* legislative districts, population deviations under 10% will almost never be sufficient to make judicial intervention appropriate. *Gaffney*, 412 U.S. at 750; *White*, 412 U.S. at 764; *Brown*, 462 U.S. at 842; *Frank*, 194 F.Supp.2d at 874 (E.D. Wis. 2002). Conversely, with respect to federal *congressional* districts, the U.S. Supreme Court has emphatically rejected the argument that small, unexplained disparities might be considered *de minimis* and has instructed that "[u]nless population variances among congressional districts are shown to have resulted despite such effort [previously defined as "a good-faith effort to achieve precise mathematical equality"], the State must justify each variance, no matter how small." *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969).**

B. Core Retention.

581. An important redistricting principle is core retention. This means redistricting should uproot the smallest number of constituents from one district to another consistent with the

needs of equal representation. *Abrams v. Johnson*, 521 U.S. 74, 99-100 (1997); *Larios v. Cox*, 300 F. Supp. 2d 1320, 1349 (N.D. Ga. 2004).

Response: **The phrase "important redistricting principle" is vague and unhelpful and redistricting involves moving lines, not "uprooting" people. Core retention is a permissive redistricting goal that can justify a plan that might otherwise be unlawful but it isn't mandatory under any statute, under the U.S. Constitution or under the Wisconsin Constitution. *See Shaw*, 509 U.S. at 647; *Gorrell*, 2012 WL 226919. Neither of the cases cited hold otherwise. There is no such thing as a free standing claim that a redistricting plan violates the "important redistricting principle" of core retention.**

582. Act 44 violates the redistricting principle of core retention with regard to Congressional Districts Three, Seven, and Eight.

Response: **Core retention is a permissive redistricting goal that can justify a plan that might otherwise be unlawful but it isn't mandatory under any statute, under the U.S. Constitution or under the Wisconsin Constitution. *See Shaw*, 509 U.S. at 647; *Gorrell*, 2012 WL 226919. Neither of the cases cited hold otherwise. There is no such thing as a free standing claim that a redistricting plan violates the "important redistricting principle" of core retention.**

C. Compactness.

583. Compactness is a desirable principle feature in a redistricting plan. *Prosser*, 793 F. Supp. at 863.

Response: **Although the Wisconsin Constitution requires that state assembly districts be "bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable," Wis. Const. Art. 4, § 4, and that state senate districts be comprised of whole assembly districts and "convenient contiguous territory," Wis. Const., Art. 4, § 5, this Court lacks jurisdiction to entertain any claim that these provisions have been violated. *Pennhurst,* 465 U.S. at 117. Under the U.S. Constitution, maintaining communities of interest and core population retention are legitimate considerations that can justify substantial population deviations but neither is constitutionally mandated. *Shaw*, 509 U.S. at 647.**

584. Act 44 violates the redistricting principle of compactness with regard to Congressional Districts Three, Seven, and Eight.

Response: **Although the Wisconsin Constitution requires that state assembly districts be "bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable," Wis. Const. Art. 4, § 4, and that state senate districts be comprised of whole assembly districts and "convenient contiguous territory," Wis. Const., Art. 4, § 5, this Court lacks jurisdiction to entertain any claim that these provisions have been violated. *Pennhurst,* 465 U.S. at 117. Under the U.S. Constitution, maintaining communities**

of interest and core population retention are legitimate considerations that can justify substantial population deviations but neither is constitutionally mandated. *Shaw*, 509 U.S. at 647.

585. There is no rational basis for causing Districts Three, Seven, and Eight to be less compact than those Districts were before the enactment of Act 44.

Response: **Although the Wisconsin Constitution requires that state assembly districts be "bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable," Wis. Const. Art. 4, § 4, and that state senate districts be comprised of whole assembly districts and "convenient contiguous territory," Wis. Const., Art. 4, § 5, this Court lacks jurisdiction to entertain any claim that these provisions have been violated. *Pennhurst,* 465 U.S. at 117. Under the U.S. Constitution, maintaining communities of interest and core population retention are legitimate considerations that can justify substantial population deviations but neither is constitutionally mandated. *Shaw*, 509 U.S. at 647.**

D. Communities Of Interest.

586. The concept of a community of interest recognizes that groups of voters share similar concerns and values, and that such values must be represented in and addressed by their legislature in redistricting plans. *Carstens v. Lamm*, 543 F. Supp. 68, 91 (D. Colo. 1982); *Legislature of the State of California v. Reinecke*, 516 P.2d 6, 24, 26-27, 30-31 (Cal. 1973); *Mellow v. Mitchell*, 607 A.2d 204, 220-221 (Pa. 1992), *cert. denied*, 506 U.S. 828 (1992); *Bandemer v. Davis*, 603 F. Supp. 1479 (S.D. Ind. 1984), *rev'd*, 478 U.S. 109 (1986); *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 688 (D. Ariz. 1992), *appeal dismissed sub nom Arizona State Senate v. Arizonans for Fair Representation*, 507 U.S. 980, *and aff'd sub nom. Hispanic Chamber of Commerce v. Arizonans for Fair Representation*, 507 U.S. 981 (1993); *Wisconsin State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 636 (E.D. Wis. 1982); Stephen J. Malone, "Note: Recognizing Communities of Interest in a Legislative Apportionment Plan," 83 Va. Law Rev. 461, 465-466 (1997).

Response: **Undiputed.**

587. Act 44 violates the redistricting concept of community of interest regarding the Third Congressional District and the Seventh Congressional District.

Response: **Although the Wisconsin Constitution requires that state assembly districts be "bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable," Wis. Const. Art. 4, § 4, and that state senate districts be comprised of whole assembly districts and "convenient contiguous territory," Wis. Const., Art. 4, § 5, it imposes no obligation to maintain communities of interest and even if it did, this Court lacks jurisdiction to entertain any claim that these provisions have been violated. *Pennhurst,* 465 U.S. at 117. Under the U.S. Constitution, maintaining communities of interest and core population retention are legitimate considerations that can justify substantial**

population deviations but neither is constitutionally mandated. *Shaw*, 509 U.S. at 647.

588. There is no rational basis for violating the principle of community of interest for these districts.

Response: **Although the Wisconsin Constitution requires that state assembly districts be "bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable," Wis. Const. Art. 4, § 4, and that state senate districts be comprised of whole assembly districts and "convenient contiguous territory," Wis. Const., Art. 4, § 5, it imposes no obligation to maintain communities of interest and even if it did, this Court lacks jurisdiction to entertain any claim that these provisions have been violated. *Pennhurst,* 465 U.S. at 117. Under the U.S. Constitution, maintaining communities of interest and core population retention are legitimate considerations that can justify substantial population deviations but neither is constitutionally mandated. *Shaw*, 509 U.S. at 647.**

E. Representative Democracy.

589. Redistricting plans should be designed to promote representative democracy. *Prosser*, 793 F. Supp. at 864.

Response: **As a general, overarching principle, admit. Deny, however, that there is any such thing as a broad and amorphous claim for the "diminishment of representative democracy," however that may be defined. Further, defendants note that the U.S. Supreme Court has held that it is an affront to the principle of fair and effective for federal judges, who are unelected, to interject into the inherently legislative task of redistricting when it is unnecessary for them to do so. *Gaffney*, 412 U.S. at 749.**

590. By violating the redistricting principles of retention of core populations, compactness, and communities of interest Act 44 diminishes representative democracy in Congressional Districts Three, Seven, and Eight.

Response: **Deny that there is any such thing as a broad and amorphous claim for the "diminishment of representative democracy," however that may be defined. Further, defendants note that the U.S. Supreme Court has held that it is an affront to the principle of fair and effective for federal judges, who are unelected, to interject into the inherently legislative task of redistricting when it is unnecessary for them to do so. *Gaffney*, 412 U.S. at 749. Finally, "compactness, contiguity, and respect for political subdivisions … are important not because they are constitutionally required—they are not—but because they are objective factors that may serve to defeat a claim [of otherwise unconstitutional redistricting]." *Shaw*, 509 U.S. at 647.**

591. Act 44 is arbitrary and capricious and has no rational basis since it ignores the redistricting principles of core retention, compactness, and communities of interest.

Response: **No such claim exists. "[C]ompactness, contiguity, and respect for political subdivisions … are important not because they are constitutionally required—they are not—but because they are objective factors that may serve to defeat a claim [of otherwise unconstitutional redistricting]." *Shaw*, 509 U.S. at 647.**

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